The Swingline Company; Spotnails, Inc. *and* Local 222, affiliated with International Production, Service and Sales Employees Union

The Swingline Company *and* John Griffin *and* Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

The Swingline Company; Spotnails, Inc. *and* Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Cases 29-CA-7563, 29-CA-7564, 29-CA-7585, 29-CA-7776, 29-RC-4658, and 29-RC-4659

June 18, 1981

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

On December 11, 1980, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, Respondents and Intervenor[1] filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Swingline Company and Respondent Spotnails, Inc., Long Island City, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Local 222, affiliated with International Production, Service and Sales Employee Union, was permitted to intervene in this proceeding.

[2] The Respondents has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Chairman Fanning disavows the Administrative Law Judge's citation of *Walgreen Co., d/b/a Globe Shopping City*, 203 NLRB 177, fns. 23 and 69 (1963), because the Chairman dissented in that case.

Chairman Fanning also places no reliance on the Administrative Law Judge's citation of *Essex International, Inc.*, 216 NLRB 831, fn. 66 (1975), because he dissented in that case. Nor does he rely on the statement in the Administrative Law Judge's Decision to which fn. 66 is appended because it describes the standard for setting aside elections based on the conduct of third parties, although the conduct of a party is in issue in this case.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the Act the foregoing labor organization is the exclusive representative of all the employees in the following appropriate units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

Unit A: All production and maintenance, shipping and receiving employees employed by Spotnails, Inc., herein called Spotnails or jointly called the Employer with the Swingline Company, at 43-34 32nd Place, Long Island City, New York, excluding all office clericals, professionals employees, guards and supervisors as defined in the Act.

Unit B: All production and maintenance, shipping and receiving employees employed by The Swingline Company, herein called Swingline, at 32-00 Skillman Avenue, Long Island City, New York, excluding all office clericals, professional employees, guards and supervisors defined in the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT warn employees to refrain from displaying union insignia or otherwise interfere with their rights to engage in union activities.

WE WILL NOT threaten employees with plant removal, layoff, or other reprisals because of their union membership, activities, or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

THE SWINGLINE COMPANY SPOTNAILS, INC.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: These consolidated cases were heard in Brooklyn, New York, on July 14, 15, 16, 21, 22, and 23, 1980. Cases 29-CA-7563 and 29-CA-7564 involve charges by Local 222, affiliated with International Production, Service and Sales Employees Union, herein called IPSSEU, against The Swingline Company, herein called Swingline, and Spotnails, Inc., herein called Spotnails, respectively, herein collectively called Respondents, of various acts of interference, restraint, and coercion of employees exercising rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, herein called the Act. The acts alleged include interrogations, warnings, and threats of discharge, which Respondents have denied. Case 29-CA-7585 involves a charge by employee John Griffin alleging his discharge in violation of Section 8(a)(1) and (3) of the Act, which Respondents also deny. The consolidated complaint in these three cases issued on January 11, 1980.

Cases 29-RC-4658 and 29-RC-4659 arise out of representation elections conducted by the Board on October 25, 1979, upon petitions filed by Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters, in units of all production and maintenance shipping and receiving employees employed by Swingline and Spotnails, respectively, in which both IPSSEU, as Intervenor, and the Teamsters participated. The Teamsters won both elections decisively,[1] and IPSSEU filed timely objections. In a Supplemental Decision and Report on Objections issued March 20, 1980, by the Regional Director, certain of the objections, not overruled, were consolidated for hearing with the outstanding consolidated complaints since they were substantially identical to issues in the unfair labor practice cases.[2]

Case 29-CA-7776 involves a charge by the Teamsters alleging interrogations, warnings, threats and promises of benefit, on which complaint issued March 26, 1980, and was then consolidated for hearing with the other consolidated cases.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the briefs filed by all of the parties except for the General Counsel, I make the following:

FINDINGS AND CONCLUSIONS

I. RESPONDENT'S BUSINESSES, THEIR INTERRELATIONSHIP, AND THE STATUS OF THE UNIONS INVOLVED

Respondent Swingline, an unincorporated division of Swingline, Inc., a Delaware corporation and wholly owned subsidiary of American Brands, Inc., is engaged in the manufacture, sale, and distribution of staple machines, staples, and related products at its principal office and place of business located at 32-00 Skillman Avenue, Long Island City, herein called the Skillman Avenue plant, and at two other nearby places of business located at 43-11 32nd Place and 45-20 33rd Street, Long Island City, in the Borough of Queens, City and State of New York. Respondent Spotnails, a wholly owned subsidiary and division of Swingline, Inc., is engaged in the manufacture, sale, and distribution of industrial nailing and stapling equipment and related products at its principal office and place of business located at the Skillman Avenue plant, Queens, New York. Swingline, Inc., and Spotnails have a common chief executive office, and the executive vice president of Swingline, Inc., is in charge of its fastner division, which includes both Respondents. Requests for funds or working capital for either Respondent are made directly to Swingline, Inc. Insurance requirements of both Respondents are handled directly by American Brands, Inc., the parent of Swingline, Inc. Further, Swingline's purchasing director assists and guides Spotnails with its purchase requirements. Spotnails occupies a physically unsegregated portion of the second floor of the Skillman Avenue plant, pursuant to an oral agreement without fixed terms under which it pays Swingline, to the lessor of the plant, for rental of that portion of the space. In addition, Spotnails pays Swingline a pro rata share of the cost of the common utility and other fixed services it enjoys. Employees of both enterprises share a common cafeteria, corridors, elevators, and to some extent, lavatories and work in the same shipping and receiving areas. While there has been no regular pattern of employee interchange, when an employee has been shifted from Spotnails to Swingline he has been given credit for length of service with Spotnails.

With respect to labor relations, IPSSEU has represented employees of Swingline and Spotnails for purposes of collective bargaining in the units previously described for the past 25 years. Labor relations policies for the Long Island City facilities are set by Swingline, whose executives have generally negotiated the practically identical contracts for employees in both units.

Based on the foregoing facts, which were stipulated to by Respondents, I conclude that at all times material herein, Respondents have been affiliated businesses with common officers, ownership, directors, and operators and constitute a single integrated business enterprise whose directors and operators formulate and administer

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[1] Among approximately 1,174 eligible employees of Swingline, 1,084 cast ballots, 658 voting for the Teamsters, 389 voting for IPSSEU, 10 voting against union representation, and 27 voting under challenge. Among approximately 113 eligible employees of Spotnails, 104 cast ballots, of which 68 were for the Teamsters, 33 were for IPSSEU, and none were against union representation, with 3 challenged ballots.

[2] All four numbered objections were overruled but hearing was ordered on a portion of other objectionable conduct alleged by IPSSEU during the course of the investigation and considered as a fifth objection.

a common labor policy affecting the employees of both enterprises.[3]

In the course and conduct of their integrated Queens, New York, business operation, Respondents annually purchase and receive goods and materials at their plants in excess of $50,000 in interstate commerce directly from points located outside the State of New York. Respondent's admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges, Respondents amended their answer to admit and so stipulated, and I find that the Teamsters and IPSSEU are each labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS

A. *Background*

IPSSEU had represented the employees of Swingline and Spotnails in each of the two units at issue herein in collective bargaining for 25 years when the Teamsters filed their petitions. Most of the incidents involved here arose during the latter stages of the preelection period, particularly the day preceding and the day of the election, as interest and concern among employees supporting each of the two unions and union electioneering reached its peak. During this period also, IPSSEU continued to represent the unit employees in the preexisting collective-bargaining relationship.

Respondents maintained an official position of neutrality between the two unions, manifested most concretely by the holding of formal supervisory meetings during which supervisors were instructed to remain neutral and not to discuss either union or the upcoming election with employees and by the issuance of a one page letter to all employees on May 21, 1979,[4] well before the filing of the petitions on July 30. In it, Swingline President John F. Thomas expressed regrets for the fact that the two-union fight was leading to confusion, unhappiness, and disruption; noted the Employer's interest in maintaining a calm, peaceful working environment; affirmed the employees' right to select either union; and assured them that whichever union was so chosen, that choice would be honored by Respondents.[5]

Respondents also appear to have maintained a flexible no-solicitation rule, prohibiting any union or other solicitation on worktime, which had the effect of interfering with production. In point of fact, Respondents maintained a very lenient policy during the preelection period, pursuant to which they refrained from disciplining employees for infractions of this rule, and further, exercised restraint as well in disciplining supervisors for participating in electioneering, except in instances where the supervisor's involvement had been corroborated or independently established.[6]

The allegations in these consolidated proceedings raise the issue with respect to Section 8(a)(1) of the Act, as to whether Respondent's policies were adhered to by low-level supervisors, and with respect to Section 8(a)(3), the issue as to whether Respondents finally acted to enforce their no-solicitation policy against Griffin after his repeated infractions made evident their was no other choice. Finally, the consolidated objection proceedings present the issue as to whether the elections conducted should be set aside or a certification of representative issued to the Teamsters.

B. *The Discharge of John Griffin*

John Griffin and another individual named Joseph Vaughn were both hired a day apart, in mid-August, on the referral and recommendation of IPSSEU Business Representative Jerry Nuzzo.[7] Swingline was in need of power press operators and Industrial Relations Manager Paul Nagle agreed that Nuzzo could send Griffin in for work in that capacity. Vaughn, a friend of Griffin's, was hired a day later as a metal grinder.

On the day he reported for work on the day shift, Griffin was assigned by Irving Sloane, now general supervisor of the press department but then its foreman, to sanding metal parts at a machine located in the department in the basement of the Skillman Avenue plant building. Griffin continued to be employed in the press department at sanding and other duties until his discharge on October 26, the day following the election. All of his work assignments were confined to the basement press department work areas.

From the very first day of his employment, Griffin was observed by Sloane away from his work station and conversing with other employees in other work areas within the press department and other departments in the building. Griffin's unauthorized absences from his work duties became habitual and resulted in a series of reprimands and orders to return to his work area, issued by Sloane. Griffin also made a practice of reporting late for work and was absent from work often during his less than 4-month tenure with Swingline.[8]

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[3] See *N.L.R.B.* v. *C.K. Smith & Co., Inc., et. al.*, 569 F.2d 162 (1st Cir. 1977), cert. denied 436 U.S. 957 (1978); *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Marine Welding and Repair Works, Inc.; Williamson Engine and Supply, Inc.; Greenville Manufacturing and Machine Works, Inc.; and Greenville Propellor Works, Inc.* v. *N.L.R.B.*, 439 F.2d 395, 397 (8th Cir. 1971).

[4] Unless otherwise noted, all dates hereinafter are in 1979.

[5] Consistent with that position, in their post-hearing brief, Respondents, while noting their belief that the objections are of no significant consequence, take no position on what remedy, if any, should be granted in the representation cases.

[6] One supervisor, Francisco Quinones, was suspended with pay during the election week for failing to comply with the Employers' prohibition.

[7] There is also evidence that a second IPSSEU representative, Joe Lavelle, was also in contact with Swingline in the successful attempt to place both Griffin and Vaughn in positions with the Company. Griffin himself informed another employee that he was put on the job at Swingline by IPSSEU. The same employee was provided the same information by Lavalle.

[8] Griffin's earning record card shows that apart from his first week of employment when he worked 37 hours, he never approached 40 hours in a week, the regular 5-day, 8-hour-per-day workweek required of all employees, and his weekly work hours varied between a low of 15-3/4 hours in his second week to a high of 31-3/4 hours in his eighth week with no work hours the week of October 13, and no overtime hours at all. In contrast, the earning record cards of the more than 100 other day-shift press department employees for the same year show a remarkable consistency, registering 40 hours for the most part with occasional weeks

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Sloane periodically reported to Nagle that Griffin had wandered around the shop, had left his work station, and was absent or late on many occasions. Nagle made note of these reports and instructed Sloane to continue to report any future difficulties of like nature with Griffin.

Griffin's conduct did not improve and on Nagle's instructions Sloane attempted in discussions with Griffin, but without success, to convince him to cease his unauthorized movements, latenesses, and absences. Sloane made clear in testimony that Griffin's work duties were confined to the basement of the main or Skillman Avenue plant building. Even on a short assignment of a period of 3 or 4 days to a clean up detail in the tool-and-die room, also located in the basement of the same building, Sloane could not foresee any circumstances under which Griffin's work would take him outside that room. Yet, a number of witnesses produced by the Teamsters testified that Griffin was seen by them campaigning for IPSSEU on working time in the Skillman Avenue plant other than in the basement work areas on various occasions during September and October leading up to the October 25 election. Griffin was also viewed as aggressive and provocative in his electioneering behavior by certain of the employees. On one occasion, according to one employee whose testimony was not disputed, Griffin was soliciting for IPSSEU, in English,[9] 2 to 3 days before the election in the hallway and bathroom on the main floor of the Skillman Avenue plant outside the cafeteria at either 10:30 or 11: a.m.,[10] just prior to or at the employee's lunchbreak. Griffin made insulting remarks, uttered profanity, and acted as if he would start a fight with anyone who provoked him. According to this employee, employees generally were trying to avoid him and to refrain from getting into any discussion of the two unions.

On election day, employee witnesses placed Griffin all over the main plant as he electioneered and did not punch in or report for work. Griffin was shouting, holding a megaphone, whistle, and IPSSEU literature, going into various departments at different times during the day and standing in the street soliciting votes for IPSSEU at midday, during employee lunch breaks. Richard Mateo, then Swingline personnel clerk who became an employment interviewer shortly after the election, and whose status as supervisor is in dispute, but whose testimony in this regard was not disputed, testified that during the election he chased Griffin away from the staple packaging area, about 100 feet from the polling area on the main floor of the Skillman Avenue plant, while Griffin was electioneering with a megaphone. Prior to election day, Mateo had also witnessed Griffin on worktime move about in the cafeteria soliciting IPSSEU votes. More than once he had been asked by Griffin's supervisor if he had seen Griffin, and, on locating him in the cafeteria, had reported these instances to Nagle, his own supervisor in personnel.

On the day following the election, Friday, October 26, Griffin reported for work. In the late morning, Nagle received a telephone call from the cafeteria manager seeking help because two employees were quarreling. When Nagle emerged from his personnel office around the corner from the cafeteria he saw Griffin and another employee arguing in the hallway in front of a few onlookers. Nagle was informed by an onlooker that the dispute concerned union matters, with the other employee supporting the Teamsters and Griffin backing IPSSEU. Nagle told them both that the election was over, and to break it up and they did so. Later, around noon, Sloane called Nagle to inquire as to Griffin's whereabouts.[11] Nagle did not know, but he was determined then to question Griffin as to why he was away from his workplace, and, if it was not for a compelling reason, to discharge him. Accordingly, Nagle left word with Sloane to send Griffin to him when he appeared at his workplace. Nagle next saw Griffin passing the personnel office at 1:30 p.m. He had not appeared there at Sloane's request and had not been at work since 11:30 a.m. Nagle called Griffin in and asked him where he had been. When Griffin replied he had been at lunch, Nagle told him his lunch was 11 to 11:30 a.m., this was 1:30 in the afternoon and, based on all his other absences and unauthorized leaving of the workplace, that he was being terminated. Griffin asked if he could talk to Rao, an IPSSEU delegate. Nagle agreed but also informed Griffin he would get his final check. The check was prepared and given to Griffin before he finally left the Swingline premises that day.

Griffin testified that when he reported for work his second day of employment, in mid-August, his timecard was missing, and on referral to the personnel department was told by Nagle that he was fired but given no reason. According to Griffin, after Lavelle of IPSSEU interceded with Swingline, he returned to his job 2 days later.[12]

Griffin asserts he campaigned for IPSSEU from the beginning of his employment, but did so on work and lunch breaks. He acknowledged that once, in his third workweek, Sloane advised him not to speak about unions during working hours, but denies that he did so. On another occasion, in September, Griffin claims that Richard Mateo told him he did not want Griffin to be speaking for IPSSEU if he wanted his job. Griffin states he was in the personnel office and Industrial Relations Manager Nagle was seated at a desk 3 yards away. Barrington Biggs, a fellow employee, who Griffin placed with him

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of 32 hours and with regular assignments of overtime and incentive hours.

[9] For many employees employed by Swingline, their native tongue is Spanish, yet those who testified regarding Griffin's activities were able to identify the substance of his electioneering comments in English. I credit their unrebutted versions of these events and take notice of the fact that while not completely articulate in English, they were able to communicate and understand simple English phrases at the workplace.

[10] Employees on the day shift received two 10-minute work breaks, at 9 a.m. and 2 p.m., and press departments employees had a lunch period from 11 to 11:30 a.m.

[11] Griffin should have been back at work at 11:30 a.m., after his lunch break.

[12] This alleged series of events is not supported by Griffin's earning record card which shows 5 consecutive workdays, totaling 37 hours his first workweek with no overtime hours—the only week in which Griffin worked 5 days. Neither Sloane nor Nagle supported Griffin's story of early discharge and rehire. Griffin does not claim his separation at the time is discriminatory and neither the complainant nor General Counsel urges a finding of violation. As Griffin's testimony is not supported by the evidence, I do not credit him in this regard.

at the time, testified about a similar incident but did not support Griffin's version of the location or of the conversation. Biggs testified, after his recollection was refreshed by reviewing his Board affidavit, that in the afternoon "coming near up to my break" while he and Griffin were conversing in the hallway between the cafeteria and personnel offices, Mateo came up and said he did not want any union matters discussed up there on the working premises at the time. Biggs did not recall any implied threat. Mateo denied ever telling any employee he would lose his job for supporting either union. Griffin's version, not supported by the employee who participated in the conversation, is not credited.

Griffin also testified that a week before the election, on October 19, Nagle informed him that the coming week would be his last. Griffin says he replied that if IPSSEU wins the election, he would be contradicting himself. Again, Griffin placed Biggs with him at the time in the personnel office. Yet, Biggs did not recall any conversation with Griffin and Nagle present and denied hearing any supervisor or foreman voice support for either union. Nagle did not recall this conversation but did not deny that he was prepared to fire Griffin at the time because of his leaving his work area and record of poor attendance but had second thoughts, not wanting any problems close to the election (after having apparently been prevailed upon by IPSSEU) and kept Griffin until the incidents described the day following the election. Accordingly, I credit Griffin that such a conversation did take place, but even Griffin does not claim that during it, Nagle uttered any discriminatory remarks or that he, Griffin, questioned Nagle as to the reason for his planned discharge, a rather odd omission for an employee who urges that his ultimate discharge was discriminatory.[13]

As earlier noted, Griffin's denial that he observed Respondent's work rule regarding electioneering on working time was contradicted by a significant number of employee witnesses,[14] as well as three Swingline representatives. Griffin's known propensity to proselytize in the plant had become notorious and even led to fears on the part of Teamsters employee adherents that engaging Griffin in union related conversations could have serious consequences since the Company must have known of Griffin's activities and by failing to rein him in it was appearing to favor IPSSEU. Griffin was in other respects as well a particularly unsympathetic and untrustworthy witness. Griffin provided three different versions of his initial firing by Nagle, first stating on direct that Nagle did not give him any reason for his firing, then testifying for the first time on cross-examination after confronted with his pretrial affidavit, in which he swore that "I did not ask why I was fired and he didn't tell me" that he had indeed asked Nagle why he had been fired but had not received any reply. Contrary to documentary evidence introduced by Respondent showing receipt by Griffin of his last pay check on Friday, October 26, which he endorsed in blank, was in turn endorsed by Vaughn and was cashed the same day, Griffin swore he had not been to work on October 26 but had instead received permission directly from Nagle to be out to Monday, October 29, because of his wife's hospitalization and had been fired on October 29. Contrary also to overwhelming testimony to the contrary by employee witnesses who saw Griffin in their departments, in the plant hallways, and in the street on election day, holding and using a megaphone or similar device to amplify his voice while soliciting votes for IPSSEU, Griffin's denial that he had or used a bullhorn on election day campaigning is more than suspect, it is not worthy of belief.[15] Based on the foregoing, I do not credit Griffin's version of the events which precipitated his discharge.[16] In particular, I also do not credit Griffin's claim that, because his home had burned and his wife was hospitalized while pregnant, he had received permission from Nagle to report late for work indefinitely starting the first week in September while he picked up his daughter at an aunt's house daily and took her to a babysitter. Apart from all the foregoing indicia of an unreliable witness, Griffin's apparent interpretation that his domestic problems gave him license thereafter to report late and remain absent from time to time without further requests or confirmations that such permission continued is not believable. Nagle denied that he ever indicated to Griffin that it was perfectly okay for him to come in whenever he pleased at any time he liked and in his own words stated that while he had no specific recollection, he would not have been so lenient as not to tell him at the same time that he was expected to shape up.

Resolution

Griffin's failure to comply with the ordinary and normal rules governing an employment relationship left him vulnerable to discharge. An employee with Griffin's abysmal attendance record over such a short period of time can derive little comfort from the fact that his em-

[13] Nagle did testify that he recalled talking once with Griffin, either inside his office or directly outside, about the problems of not only Griffin's latenesses and absences but also his unauthorized leaving of his work area. Nagle told Griffin that he had to knock it off, that he was there just as any other employee without special privileges. Nagle added that he had heard Griffin was going around talking to people working a power press and he was therefore endangering their safety. Griffin was not called on rebuttal to respond to this conversation or any of the others previously cited.

[14] Griffin and Vaughn, the other August IPSSEU employment referral, were the only two witnesses to claim that Mateo had solicited votes for the Teamsters by shouting "vote for 808" with a raised arm as he directed employees to the polling area in the hallway of the main floor of the Skillman Avenue plant on October 25. More than two dozen witnesses called by the Teamsters who had voted during many different time periods that day testified that Mateo engaged in no electioneering and no shouting for the Teamsters but only directed them to the polling area.

[15] Vaughn testified that he obtained batteries from someone in personnel, specifically denied by Nagle, in order to fix the megaphone which he had in his possession for use by IPSSEU supporters on election day. While Vaughn also testified the device did not work mechanically, it would appear that such a device could very well amplify sound manually merely by virtue of its design. Furthermore, a photograph introduced in evidence depicting Griffin from the rear gesticulating in the middle of the street outside the plant at midday of the election shows Griffin's right hand raised holding literature and Griffin's left hand with forefinger curled toward a taut thumb, a gesture consistent with the grasping of such a device, but not at all consistent with holding or blowing a whistle, another item witnesses recall Griffin using that day.

[16] Including Griffin's assertion that Nagle discharged him on October 29 because he had campaigned for Local 222.

ployer was well aware that he was spending considerable time while on its premises engaged in solicitation of support for IPSSEU in the upcoming representation election. The fact is that this employer went to great lengths, well beyond what could be appropriately held to be reasonable, in exercising restraint toward Griffin for his absences, tardiness, and leaving the workplace during the day. Respondent's industrial relations director testified that the Company wished to avoid problems with the incumbent IPSSEU during the preelection period while the existing contract continued to be administered on a daily basis. While one can question Respondent's failure to act sooner, there is no basis for attributing any discriminatory motive to Respondents[17] when Nagle finally concluded as a consequence of the events on the day following the election that matters had finally gotten out of hand with respect to Griffin. Thus, in accordance with the standards recently announced in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the General Counsel has failed to make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in Respondents' decision.

While Respondents' flexible no-solicitation policy was adopted and transmitted orally, it is nonetheless a valid exercise of employer authority, the enforcement of which cannot be held to be an interference with employee Section 7 rights.[18] When Nagle finally acted after the election to terminate Griffin's employment basing his decision on an accumulation of incidents and conduct by Griffin at least in part exhibiting a willful violation of a valid company rule prohibiting union solicitation during work time, Respondents acted well within the law.[19] Without being obliged to make such a showing, Respondents have established that they would have discharged Griffin even in the absence of any protected conduct in which he engaged during the course of his solicitations. I accordingly conclude that Griffin's discharge did not violate Section 8(a)(1) and (3) of the Act and that these complaint allegations should be dismissed.

C. *The Various Incidents of Alleged Interrogations, Warnings, Threats, Promises of Benefit, and Union Solicitations*

These incidents may be appropriately separated into three categories; (1) conduct which preceded the filing of the petitions;[20] (2) conduct engaged in during the critical period alleged by IPSSEU in its charge and election objections referred for hearing; (3) conduct prior to[21] and after the election alleged by the Teamsters in its charge.

1. Prepetition conduct

The petitions in Cases 29-RC-4568 and 29-RC-4569 were filed on July 30. At the end of May, Rosa Rivera testified she had a conversation with Jose Colon, a foreman's helper. At the time, Rivera, an inspector of electric tacking machines, was present with a few other employees at the workplace in the morning while some tables were being set up. The employees started to discuss the union campaigns. Colon, who was present, asked Rivera which of the two she liked. Before Rivera responded, Colon told her he liked the Teamsters but could not say it only because of the position he held. Rivera did not recall her reply. Then, sometime in June, as Rivera was entering the plant about 7 a.m. to begin work, while holding a piece of literature distributed by IPSSEU, Colon was standing near the timeclock observing a group of employees who had lined up to punch in. When he saw her, Colon asked, "Why are you carrying that garbage for? What do you need it for?" Rivera replied, "we're in a free country and I can carry any kind of paper I like and continued on into the plant."

Respondents in their answer admitted the status of Colon and another general foreman's assistant, Migdalia Ocasio, as supervisors under the Act. A number of employees who testified also placed Colon as well as Ocasio in the posture of front line supervisors in the assembly department who oversee the work of employees under them, assign them work, direct them in their jobs, and see to it that they comply with various work rules; for example, seeing to it that they punch in at the beginning of the workday as did Colon in the incident just described. Furthermore, both Colon and Ocasio, as well as all other foreman and supervisors of Respondents, had been called to supervisory meetings and instructed to remain neutral during the campaign,[22] a fact to which Colon himself alluded in the May conversation with Rivera and which constitutes another indicia of their status with Respondents. I conclude that Colon and Ocasio at all times material herein were supervisors within the meaning of Section 2(11) of the Act. I also credit Rivera's testimony, particularly in light of Respondents' failure to call Colon to rebut.

Resolution

At first blush, Colon's May inquiry and even his June exclamation appear to lack the coercive impact normally associated with unlawful interrogations or similar restraining remarks. Colon is a low-level supervisor, his

[17] Griffin has not been credited as to any of his claims that Respondents warned him to refrain from union activity in the plant on his own time, conduct which may have independently violated the Act and may have provided some basis, however slight, for a showing of hostility toward Griffin for the exercise of protected concerted activity. Furthermore, the relevant complaint fails to allege any such threat or warning directed toward Griffin.

[18] There has been no showing that the rule was adopted for an illegal purpose or was enforced in a disparate manner. As shown, Nagle even acted against supervisors to abort managerial involvement in the election campaign when circumstances and the proofs warranted.

[19] See *Whitcraft Houseboat Division, North America Rockwell Corporation*, 195 NLRB 1046 (1972); *Clear Lake Hospital*, 223 NLRB 1 (1976).

[20] Prepetition conduct may not itself form the basis for setting aside the election, *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961), even though it may lend meaning and dimension to related post petition conduct. See *Dresser Industries, Inc.*, 231 NLRB 591 (1977).

[21] This conduct forms no part of the objections referred to hearing.

[22] In either September or October, Ocasio informed employee Maria Bueno, an employee in electric stapling, that the office had called her in and other supervisors and line leaders and told them that they would lose their jobs if they said anything about the election. Just after the election, Ocasio took Bueno aside and said I just wanted to let you know that I was for 808, but I did not want to talk about it because my job was at stake.

May questioning took place on the plant floor, informally, in the context of an employee initiated union related conversation, and without any evidence of threats of reprisal or promises of benefit. However, as noted recently by the Board, even inquiries of this nature "constitute probing into employees' union sentiments which, even when addressed to employees who have openly declared their union adherence, reasonably tend to coerce employees in the exercise of their Section 7 rights."[23] The second remark, in one sense, was a registration of personal feeling by the same low-level supervisor unaccompanied by either threat or promise. Yet, here too the Board has commented in a like situation that neither the opinion nature of a warning nor the speakers' low-level status are conclusive since employees to whom they are directed can reasonably assume that the supervisor is privy to the decisions of Respondent's management.[24] I conclude that Rivera did not take Colon's statement as representing Respondents' position on the matter in light of its recent letter of neutrality,[25] and, further, in light of Rivera's personal knowledge of the restraint Respondent had placed on Colon implicit in Colon's final statement during his inquiry at the end of May. However, Colon's remarks conveyed Colon's displeasure with her union activity and was an attempt to discourage further activity of like nature. Even though not necessarily representing the highest authority in the plant, it could serve reasonably to dissuade even so committed an adherent as Rivera from courting the continued displeasure of her immediate superior. I therefore find that these prepetition items of conduct constitute an unlawful interrogation and warning, in violation of Section 8(a)(1) of the Act.

2. Conduct during the critical period

Rivera further testified that one day in mid-September she did not report for work but instead attended an off-premises meeting held between IPSSEU representatives and Swingline in the capacity of a member of the IPSSEU employee committee, at which the parties discussed IPSSEU's apparent demand that Respondents continue negotiations for a renewal agreement in the face of the then pending Teamsters petitions. Between 35 to 45 employee committee members attended. It was Rivera's recollection that the Swingline spokesman, Herbert Carr, vice president of manufacturing, informed IPSSEU representatives that if the Union could prove that the employees really wanted to continue its representation, the Company would continue negotiations. In any event, Rivera returned with the other employees in two chartered buses to the Skillman Avenue plant at the close of the dayshift at 3:30 p.m. and, at the direction of IPSSEU representatives and along with other IPSSEU committee members, commenced to approach employees in their departments leaving work as well as employees arriving for overtime to sign cards to have IPSSEU continue to represent them. As Rivera was handing out the cards, Myllan, a general foreman in the electric tacking department, asked her who had given her permission to give out the cards. Rivera told him she did not need permission because the Union was negotiating with Swingline. Colon, who was also present, told her she should be working. Myllan then asked her to stop, also told her she should be at work and that he needed people specializing in jobs then being performed[26] and that there was a lot of overtime work available. When Rivera refused to cease her activity Myllan left, but Colon, who remained, angrily exclaimed in the presence of at least 10 other employees "look at her, she wants 808 and now she is getting the signatures for 222, so, she should be ashamed." Rivera said she then became nervous and left.

Later, toward the end of September, as Rivera was talking with a few other employees during their break, including Antonio Stevens, electrical tacking chief inspector, Colon came up and addressing Stevens stated, "You people are from the 222 committee, when is the date of the election?" Colon added that everyone had been asking him when the date would be and he had told them not to ask him but rather the Local 222 committee members who should know. Rivera understood that Colon's remark had really been intended for her since she was the only person who was a member of the Local 222 committee and she believed he would choose not to address her directly because there had been a falling out between them lately, apparently since the earlier incident. Accordingly, Rivera, addressing her remarks to Stevens, said we do not know the date, and its selection is a decision of the Department of Labor. Rivera testified that at this point Colon said that 808 should win, that the employees should vote for 808 because if 222 won, the Company would lay off all the 808 supporters.[27]

Then, a day before the election, October 24, just before quitting time, about 3 p.m., Rivera was at a worktable where approximately six other employees were seated assembling and wiring electric tackers. Colon came up, and screamed, "Tomorrow, you know what you have to do so the s— of a b— will no longer be laughing at you, to be making fun of you." I also credit

[23] *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), expressly overruling to the extent inconsistent therewith *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974), and *B. F. Goodrich Footwear Company*, 201 NLRB 353 (1973).

[24] *Id.* at 1436. Nevertheless, Rivera's reply demonstrates that this criticism of employee alignment with IPSSEU did not have the effect which may have been the reasonable tendency of the remark.

[25] Cf. *Walgreen Co., d/b/a Globe shopping City*, 203 NLRB 177 (1973).

[26] The testimony at this point in the record is not clear, in part at least because of the employment of an interpreter to translate the questions put to Rivera into Spanish and her Spanish answers into English. Certain errors in the transcript are hereby noted and corrected.

[27] The witness' testimony here illustrates the problems which are sometimes encountered when the testimony is filtered through the translation process. Thus, Rivera testified about Colon's statement regarding layoffs three times. The first time, on direct examination by General Counsel, the translator probably erred in failing to repeat precisely the witness' answer given in Spanish. Nevertheless, the substance of Colon's remarks is apparent. On cross-examination by Teamsters counsel, Rivera responded positively to a question which in my judgment constituted a proper clarification of Colon's comment. Finally, it could be argued that on examination by IPSSEU counsel, the answer now had a different emphasis, for example, a change from Colon making a suggestion to now directing employees to vote for 808. Yet, the witness appeared to be trying to explain Colon's intent and not the words he used. I have credited Rivera, again particularly in the absence of any contrary evidence and on the basis of her generally trustworthy demeanor and effort to testify carefully in accordance with her best recollection, in a version which is a synthesis of the three and which I conclude best represents what Colon in fact said.

Rivera's testimony in this regard, Colon never having been called as a witness by Respondents.

Another employee, Consuello Arbreu, an assembler, testified that after voting in the election at 11:30 a.m., while walking back to her workplace with another employee, she overheard Colon and Ocasio in Spanish ask a group of four or five employees from the same department, who also had just voted, if they had done what they had been told, and voted for Local 808. Abreu also testified for the first time on cross-examination that after the election, on October 25, Colon stated to employees that if 808 won a lot of people from 222 would be thrown out. She also testified, in accordance with and after having been read a portion of her pre-trial affidavit, that at no time did she hear Colon say the employees are to vote for 808, or that if 222 won the election employees will be discharged. Abreu then contradicted herself and testified that such comments were made by Colon to a group of employees but after December 18, the date of her affidavit. She next contradicted herself again to say only herself and the employee who had accompanied her from the polling place had heard these remarks. Abreu contradicted herself yet again by indicating that the statement regarding layoffs if 222 won was phrased rather in terms of layoffs of 222 adherents if 808 won, and that this statement, the one she had attributed to Colon on October 25, was made perhaps 2 months afterward.

I cannot credit such confused testimony and will, accordingly, disregard Abreu's allegations, including another in which she claimed Teamsters observers told voters how to cast ballots by holding the printed ballot which they handed to voters with the fingers of their hand placed on the box showing the Teamsters as one of the choices.

Employee Irma Jachez testified that at the beginning of October, she overheard Colon tell another employee, Rufino, in the assembly department, that there would be an election, that a new union was coming in, and there would be better benefits than those under Local 222. Jachez heard Rufino reply that he was going to vote for 222, because that is the one he liked better.

Jachez also testified that 2 or 3 days later she heard Colon tell a new woman employee seated at a worktable 5 or 6 feet behind her that there was going to be a new union at work because the union that was there before had never done anything for the Swingline employees, that they never gave any benefits at all. Jachez denied that Colon had told the woman to vote for Local 808.

Edward Rivera, secretary-treasurer of Local 222, IPSSEU, testified about an altercation with Marcel Zommer, Swingline's plant engineer in charge of the maintenance department, during which he alleged Zommer attacked him physically and verbally in the presence of employees and warned employees not to support IPSSEU but rather to assist the Teamsters. According to Rivera, sometime in late September, while some maintenance employees were on lunchbreak between 11:30 a.m. and 1 p.m. he joined them in the cafeteria and discussed various work problems they were having with Zommer. Rivera was accompanied by Theresa Rodriguez and Alfredo Duenas, IPSSEU business representatives. After 15 minutes, Zommer entered the cafeteria. As alleged by Rivera, Zommer, uninvited, came over and sat down a few feet from the table at which he and about five employees were talking. Zommer's presence caused a suspension of the conversation. Rivera asked Zommer to leave because he was part of management but Zommer refused, saying he had the right to be anywhere because he was a boss. Rivera then told him to get lost, but rather than leaving, according to Rivera, Zommer then interjected himself, commented about the high cost of Rivera's suit, again refused to leave, and then told the IPSSEU representatives they were not going to be around, that there was no reason for the people to talk to Rivera because their time was coming. At this point, as related by Rivera, Zommer got a little angry and grabbed Rivera's jacket lapel as he rose from his seat. Rivera grabbed Zommer's front in turn, pushed, and both went down with Rivera on top. Theresa Rodriguez then came between them. Zommer screamed he was going to call the police and that he was going to kill Rivera. Rivera added that right after the incident Zommer said he was going to make sure that 808 would win the election because we were a bunch of goons. Zommer then left the cafeteria. When Rivera was then asked on direct examination whether this last comment about 808 was made before or after Zommer grabbed Rivera, he now testified that while seated Zommer had also commented directly to the employees that Local 808 was a better union than Local 222 and he recommended the former. Rivera further testified that Zommer returned after about 10 minutes just as Rivera was leaving, repeated his earlier comments that he was going to throw us out and tell the people to vote for Local 808, and when Rivera told him to stay away from him, Zommer told Rivera he had a gun and was going to shoot Rivera. Rivera then left but on the way out saw Nagle and briefly spoke with him about the incident.

The Teamsters called a maintenance employee, Mialan Koscika, a member of the Local 222 employee negotiating committee, who also testified about the incident. Koscika placed the time as 2:30 p.m. when maintenance employees take their afternoon workbreak. The lunch periods had concluded. Rather than there being 250 to 300 employees in the cafeteria as claimed by Rivera, Koscika placed the number at or about 30 or 35, some of whom were employees just arriving to start the night shift. Koscika placed two employees at one table with Rivera and another group of three at a second table. After a discussion of grievances against Zommer, including claims that Zommer treated and paid fellow Rumanians better than he did others in the department,[28] Zommer entered the cafeteria, Rivera saw him and called him over saying I want to talk to you. Zommer sat down at the next table and asked, "about what." Rivera said, "how you treat these people." Rivera also told Zommer that the people had him up to here, in reference to complaints about his treatment of the workers. Zommer said if you want to talk to me do it in my office. Rivera then insisted on Zommer discussing his

[28] The witness testified mostly in English, with an interpreter in Serbo-Croatian present to assist in translating as necessary.

treatment of these employees right there. Zommer declined, saying, "I am sorry no, I don't want to talk with man who wears suit three or four hundred dollars." Rivera responded, "Don't b— s— me, you have a sweater, $50, $60, you are rich too." As related by Koscika, Rivera at this moment rose and grabbed Zommer by his shirt front and while doing so caused Zommer's eyeglasses to fall to the floor and Zommer's chair to fall over. In grabbing Zommer, Rivera's hand also grazed Zommer's face and caused a slight scratch on Zommer's cheek. Zommer told Rivera to pick up his eyeglasses. Rivera refused but grabbed Zommer's front again saying, "I grabbed you over here, not where your glasses are." At this point, a Rumanian maintenance employee, came between the two, separated them, and Zommer left. Koscika remained for 10 minutes to the end of his break and when he and the other employees left, Zommer had not returned. Koscika did not recall any other comments by either of the two main participants. When asked specifically, he recalled Theresa Rodriguez being present and that she tried to keep Rivera quiet. Koscika's careful, straightforward presentation was impressive. He was also able to identify each of the employees who was present during the incident, by full name or nickname. On cross-examination by both General Counsel and IPSSEU counsel, his recital was consistent with his direct examination in all major respects. The point that stayed with Koscika and the other employees present after the incident was that Zommer had appeared to be motivated by a desire to show the workers he was not afraid of Rivera. That characterization is consistent with Zommer's baiting of Rivera and his response to Rivera's physical attack. Yet, at no time did Koscika suggest that Zommer had started the fight or had cursed Rivera or warned employees they should support the Teamsters. In fact, according to Koscika, no unions were mentioned during the whole incident.

It is noteworthy that no employee witnesses were called to corroborate Rivera's account.[29] Koscika had been a supporter of IPSSEU. His testimony against its interests is entitled to greater weight on that factor alone than Rivera's self-serving interest in showing conduct of Respondents' supervisors warranting a reversal of the election outcome. In contrast to Koscika's evenhanded recital, Rivera attributed rther coercive statements to Zommer after his initial narrative. His failure also to describe in detail his chance encounter with Nagle makes suspect his claim that Zommer twice threatened him with bodily harm. Such a threat would normally have elicited an effort to restrain Zommer by peaceful means. Yet, Rivera failed to testify that he even reported this matter to Nagle, much less that he sought police protection. In my judgment, it would have been far more likely that Rivera rather than Zommer would have initiated the effort to involve Zommer in the problem airing as a way of demonstrating to the employees before the election the effectiveness of IPSSEU in enforcing the contract and employee protections, and further, far more likely that Zommer would refuse to be drawn in, rather than that Zommer would have himself then initiated a dispute with the IPSSEU delegate. Based on the foregoing, as well as my close observation of the two witnesses who did testify to the matter,[30] I credit Koscika. I do not credit Rivera's version, and I conclude that no directions to employees to assist the Teamsters and refrain from supporting IPSSEU took place on this occasion.

Employee Rogers Ivy, a staple machine inspector, called as a witness by counsel for the Regional Director, testified that on October 25, the day of the election, as he and a small group of workers were talking about the election, Joe Bodai, a foreman in the assembly department,[31] came up to them and made a comment. Ivy had just told the others it would be best if they vote for 222. Bodai commented 222 "would do the same thing they did the last 26 years for us and not give us nothing." He said this was his own opinion. This comment is not alleged in the complaint but is included in the objections alleged by IPSSEU. Bodai did not testify. I credit Ivy.

As earlier noted, the status of Richard Mateo as a supervisor is in dispute. First employed by Swingline in approximately 1974, he has been employed in one capacity or another by the personnel department for the last 4 years. By January 1979, Mateo had become a personnel clerk. Like other employees Mateo punched a timeclock and was paid hourly. His duties included showing new employees to their work stations, arranging for locker issuance, introducing them to their foremen, acting as interpreter for Spanish-speaking job applicants, administering first aid, listening to employee complaints, and assisting in security arrangements. Gradually, beginning in August and ending in November, Nagle groomed Mateo for greater responsibility as a personnel interviewer. In August, Mateo started to make recommendations for hire, particularly of unskilled applicants, with Nagle retaining final authority to accept or reject Mateo's advice. Nagle testified that as time went on and he determined that Mateo's judgment in these matters was maturing, he came to accept Mateo's recommendation 80 percent of the time. Furthermore, Mateo exercised the responsibility of making independent hiring decisions with respect to approximately 30 percent of the unskilled applicants. During this same period of time over the summer and the fall, Swingline was hiring unskilled labor at the rate of five per day.[32] Upon Mateo's promotion to interview-

[29] When, at the close of the hearing, Rodriguez had been unable to appear on behalf of IPSSEU as scheduled, its counsel sought and obtained an all party stipulation that if she had testified with respect to the Rivera-Zommer incident, her testimony would have corroborated the story and facts as related by Rivera. While I received that stipulation in evidence, it cannot substitute for my personal observation of the witness during her direct and cross-examinations as basis for determining credibility. Further, that stipulation in effect requires that I view her corroborative testimony in the same manner as that of Rivera. I cannot give it any greater weight. Therefore, to the extent I find Rivera's version lacking in verisimilitude, her stipulated testimony cannot change that conclusion.

[30] I am not unmindful of the fact that Zommer did not appear to deny Rivera's allegation. It could be that after Koscika had testified as a Teamsters witness, Respondent's presentation coming last, company counsel determined his appearance was unnecessary. In any event, Koscika witnessed the full affair and his version is entitled to the far greater weight.

[31] Respondents admitted his supervisory status under the Act.

[32] Mateo, not present during Nagle's testimony, minimized his own hiring and recommending for hiring functions prior to November. His recollection of effectively recommending as few as four unskilled appli-

Continued

er in November, he was given full authority to hire all unskilled employees.

In addition to Mateo's hiring role, he appears to have represented Swingline on occasion in dealing with IPSSEU representatives in Nagle's absence or unavailability in resolving minor grievances and complaints to a greater extent than Nagle was willing to attribute to him.[33] Furthermore, even if Mateo's role as company representative in dealing with employees directly was limited, from time to time he appears to have acted in a supervisory role or, at least, in a posture in which employees could reasonably infer that Mateo represented and spoke for supervisory authority.[34] Thus, e.g., Mateo directed Griffin to return to his workplace and to cease violating the Company's no-solicitation rule when informed of Griffin's absence by his immediate supervisor, and Mateo informed employee Jackie Miles that if his attendance and tardiness did not straighten up, he could not save his job anymore.

Respondents, in their brief, and the Teamsters during the hearing argued that Mateo did not enjoy supervisory status, primarily because his hiring recommendations and hiring of a portion of unskilled workers were hedged in by specific company guidelines which made his processing of applicants a routine enterprise lacking in the exercise of independent judgment. I cannot ascribe so limited a role to Mateo's employment activities, particularly in light of Nagle's frank appraisal that as Mateo's judgment became more seasoned, he permitted him a wider latitude in making independent decisions on hiring without requiring consultation on each applicant, and, further, that in borderline situations, it was Mateo's initial decision whether to consult Nagle at all. The guidelines also were oral and not so specific as to remove Mateo's exercise of independent judgment in making hiring recommendations and decisions.[35] For the foregoing reasons I conclude that Richard Mateo, at all times material herein, was a supervisor within the meaning of Section 2(11) of the Act.

Griffin's claim that in September Mateo threatened him with discharge for soliciting IPSSEU support on his own time has already been discredited. Another employee, Enrique Cartagana, testified that a week before the election while he and Mateo were alone in the cafeteria he asked Mateo what he thought about the election. Mateo replied that 808 was going to win and that Cartagana should vote for 808. Cartagana, who later was an IPSSEU observer at the election, merely replied okay and that ended the exchange. Employee Jackie Miles testified that he went to vote on October 25 at 1 p.m. with a group of about 20 other fellow employees from the assembly department. He was at the rear of the group about 15 feet behind them as he came down the rear stairway from the second floor work area and saw Mateo standing at a point where the hallway on the main floor leading from the area where the employee cafeteria and personnel offices are located makes a right angle turn toward the voting area.[36] As he passed by this point with no one else within earshot, Mateo and Miles first exchanged greetings and then Mateo asked Miles who he was going to vote for. Miles responded that is a secret. Mateo responded, "You know, we are friends." Miles then said he was voting for 222, to which Mateo replied, "I don't want to hear that." Miles proceded on to the polling area.

Mateo denied making either of these comments to Cartagana or Miles or engaging in any solicitations, interrogations, or threats to any employees. While I have previously credited Mateo with respect to his exchange with Griffin in September, as to these exchanges I credit Cartagana and Miles. Miles was friendly with Mateo, having played with him on the Swingline softball team, and it would have been logical for Mateo to have initiated the interchange and to have followed up with his friendly inquiry, and even his final comment was not out of character for a personnel functionary with Mateo's responsibilities and predilections.[37] Miles, who had to have his recollection refreshed with respect to Mateo's comments concerning saving his job in the past, was otherwise direct and straightforward in his presentation. Cartagana, who did not consider Mateo a boss and who testified he sought Mateo's union opinion in the cafeteria, also did not prevaricate and made a believable presentation.

A major IPSSEU allegation in the objection proceedings is that Mateo engaged in outright verbal electioneering in favor of the Teamsters while stationed in the hallway as employees passed by him on the way to vote. This claim was supported by only 2 of the 28 employees who testified as to Mateo's behavior at the intersection of the two corridors as they proceeded to vote at various times while the polls were open from 6 a.m. to 5 p.m.[38] These two witnesses were Griffin and Vaughn.

Griffin testified that as he passed by the intersection at or about 2 p.m. on the way to vote with approximately 100 packing department employees walking ahead of him, he saw Mateo, seated on a chair, raise a clenched fist and proclaim "Vote for 808." Earlier in the day, at his lunchbreak, Griffin along with Biggs and another

cants prior to November must be held to be faulty to a major degree in view of the significant exercise of these roles attributable to him by his immediate superior, Industrial Relations Director Nagle.

[33] Even Nagle agreed that he had issued no specific instructions to Mateo as to which minor employee problems he could handle independently.

[34] I am not unmindful of the fact that in the perception of at least one employee, Enrique Cartagana, Mateo was not considered a boss prior to the election.

[35] These responsibilities and the use of independent judgment they entailed readily distinguish the cases cited by Respondents at page 15 of their brief.

[36] Respondents had constructed a hallway leading to the voting area in a rear section of the factory floor by placing bailed wire on both sides of an open work space to form a passageway of some 50 feet from Mateo's position to the voting area. Mateo had been assigned by Nagle to direct employees to the voting area as they were released in turn by department to vote over the time the polls remained open. The assignment was made after Nagle had received reports early that morning that employees had been attempting to enter the polling area through the corridor. Nagle determined to strictly control access by having Mateo check personal identification (identity badges having been issued to all employees the previous day) and to monitor the movement of employees in accordance with the release schedule to prohibit loitering and confusion.

[37] As stated earlier, Mateo had unnecessarily and erroneously sought to minimize to an extravagent degree his hiring role during the preelection period. His credibility thus left something to be desired.

[38] See fn 34, *supra*.

friend stood outside the cafeteria near the men's locker room and saw Mateo make a similar gesture with his first as hundreds of employees passed by to vote but was too far away to hear any remarks. Significantly, Griffin could not identify any of the hundreds of employees or their departments as they proceeded down the hall approximately 50 feet away within viewing distance. Also significantly, Biggs did not corroborate Mateo's gestures or speech. He testified that neither Mateo nor any other foreman or supervisor spoke in his presence in favor of one union or the other, although he was in the cafeteria with Griffin a good portion of the day.

Biggs' experience was similar to a number of other employees who testified that Mateo acted in an evenhanded manner in enforcing Respondents' procedures for voting. Biggs himself was turned back by Mateo because he did not have a clip for his I.D. badge, which he produced from his wallet. After procuring a clip so he could display the badge, Biggs passed Mateo a second time to vote without incident. Other employees were admonished by Mateo to stay out of the area after they had voted, asked to show their identification, or directed to the proper exit to their department as they passed him by a second time after casting their ballots. Three employees, Carl Espinal, Marcos Quijije, and Roberto Buergos, as well as Mateo, all corroborated the facts concerning an incident arising during the same period to which Griffin testified, between 1:45 and 2:15 p.m. As these employees, among a group of 30 from the assembly department, went by Mateo, Espinal, when about 20 feet from Mateo, shouted out in Spanish, "vote for 808" while thrusting his right first upward. Mateo motioned Espinal over, directed him to cease such conduct and to keep quiet, and, after receiving an apology from Espinal, sent him on his way.

Vaughn testified that he also had been sent back by Mateo because he did not have his I.D. tag when he went to vote at 9 a.m. with 15 other employees. But Vaughn swore that just before he was stopped, Mateo clapped his hands and intoned "808, 808, 808."[39] However, on cross-examination, after having been shown his pretrial affidavit in which he had sworn that Mateo had raised a clenched fist, Vaughn was uncertain whether the gesture was clapping or a raised fist but was sure that Mateo did something with his hands. Vaughn was also the only witness who insisted that 808 representatives were using a megaphone to broadcast their message outside the plant on election day. Vaughn also claimed that the personnel office supplied him with batteries for his megaphone, further, that the Company, Swingline, had furnished the megaphone for IPSSEU.[40] Yet, in contradiction to this, Vaughn denied that he had ever talked to employees about supporting 222, or that he ever heard Griffin do so, in spite of finally recalling seeing Griffin outside the plant on all his breaks that day.

Vaughn was fired the same day as Griffin, the day after the election, after hitting another employee while at work on election day because he "wanted to." Vaughn said he failed to ask Nagle the reason for his discharge. Vaughn proved also to be less than forthcoming in his explanation of how he just happened to be in the neighborhood of the Board's office without an appointment the day he supplied the Region with his affidavit.

Given the inconsistencies and incongruities in the testimony of Griffin and Vaughn, and having previously discredited Griffin with respect to the events relating to his discharge, and in light of the overwhelming testimony regarding Mateo's proper conduct during most hours of the election, including the times alleged by Griffin and Vaughn, I conclude that their stories regarding Mateo's gesture and shouts for the Teamsters are imaginable and I do not credit them.

I also conclude that another employee's claim that Mateo indicated a preference for the Teamsters while directing employees to the polls by raising his right hand in the direction of the polling place toward a sign with the legend "Vote 808" hanging on the bailed wire fence 15 to 20 feet away cannot be credited. Most other employees who were asked could not recall seeing such a sign. The witness could identify only the gesture of a raised hand generally extended in the same direction as the polls and the sign as the basis for Mateo's signaling a preference. Such a result may not be reached on so tenuous a thread of evidence.[41]

Finally, Mateo was alleged by IPSSEU in its election objections to have walked down 50 feet from his monitoring post to the election area, where, by his presence alone in the vicinity of the polls, he may have intimidated and threatened employees casting their ballots. A portion of employee Rogers Ivy's statement of October 26 was read into evidence as a past recollection recorded when he failed to recall from it that while he was an election observer in the voting area, he saw Mateo look in for about 30 seconds and then leave. Mateo himself confirmed that on two or three occasions he went down the corridor toward the polls, once to get a Board agent to answer a phone call and the other times for a reason he believed related to the election but which he could not then recall. There is no independent evidence showing what, if any, impact, Mateo's momentary proximity to the polling area had on voter independence, or if any employees other than Ivy[42] saw Mateo just outside the polling area. Given the extremely limited nature of the evidence adduced, I am unable to find that Mateo's presence constituted a form of intimidation of employees such as would warrant setting aside the election and recommend its dismissal, even assuming that the Regional Director intended that this matter be heard as an allegedly nonverbal warning attributed to Mateo.

[39] Vaughn denied that Mateo spoke to him the second time he went to vote when he was alone.

[40] Nagle who was unusually frank and forthright in admitting that Swingline had, indeed, been overly lax in permitting electioneering by employees violative of its no-solicitation policy and, in particular, had failed to control Griffin, strongly denied any breach of managerial neutrality as, e.g., that his office provided the batteries. I credit his denial.

[41] Neither was this claim considered nor forwarded to hearing by the Regional Director who frames the factual issues to be determined. See Sec. 102.69 of the Board's Rules and Regulations.

[42] Recall that Ivy was directed by Mateo to cease his loitering in the corridor outside the polling place after he had voted.

Resolution

While an employer may not provide aid and support to a labor organization without violating Section 8(a)(2) of the Act, the Board has recognized that an employer need not remain silent when confronted with rival labor organizations competing to represent its employees. The employer may indicate its preference for one of the competing organizations, provided it does not accompany such statements of preference with threats of reprisals or promises of benefit.[43] This standard has been employed in determining whether the employer's statements violated Section 8(a)(1) of the Act,[44] as well as in deciding if an election should be set aside.[45] The foundation for this rule stems from the employer's right to free speech provided in Section 8(c).[46]

In light of these cases it is clear that Colon's statement, "vote for 808 because if 222 wins, the Company will layoff all 808 supporters," contains a threat of reprisal sufficient to place it beyond the protection of Section 8(c).[47] However, the other statements by Colon, to which Rivera testified, lack any threat of reprisal or promise of benefit, are not otherwise coercive, and do not violate the Act. Neither are the statements attributed to Colon by Jachez that Local 808 would provide better benefits than Local 222 violative, since they lacked any threat of reprisal or promise of benefit. One might argue that Colon's statements were implicitly indicating that better benefits could be achieved by selecting Local 808 because Respondent would bargain more favorably with Local 808 than Local 222, and would therefore be an impermissiable promise of benefit.[48] However, the more reasonable interpretation of his statements is that Colon felt Local 808 would provide better benefits because it is a better representative. Similarly, the statement that Supervisor Bodai made contained no promise of benefit or threat of reprisal if one voted for Local 222. He merely indicated that in his opinion Local 222 had not been representing the employees effectively and if retained by them would continue to do nothing—a personal opinion as to Local 222's future lack of effectiveness. Such an expression of opinion has been found insufficient to justify setting aside an election.

I also conclude that Mateo's[49] response to Cartagana's question, regarding Mateo's opinion of the unions, is not violative conduct. Neither the content of his response (which merely indicated his preference for 808), nor the circumstances in which the conversation took place had a coercive effect. However, Mateo's inquiry to Miles as to how he intended to vote does violate Section 8(a)(1) of the Act. The Board has clearly stated that any interrogation of employees as to how they are going to vote in a pending election is a violation of Section 7 of the Act, even if the employees were assured that no reprisals would occur.[50]

3. Conduct alleged by the Teamsters as violative of Section 8(a)(1)

The complaint in Case 29-CA-7776 contains allegations directed toward coercive conduct engaged in by Assistant Foreman Antonio Colicchio.[51] Employee Victoria Krosta testified that on October 24, the day before the election, while at her workplace at 12:30 p.m., she had a conversation with Colicchio. He was at a corner cabinet right next to a workline of machines she inspects where he sold cosmetics to employees. Krosta was wearing a printed Teamsters T-shirt of a dark orange color which contained the name of Local No. 808 as well as the heads of horses. Krosta asked for some cosmetics. Colicchio asked her to come over to him and when she did so he grabbed her by the sleeve, looked at her T-shirt, and said, "What is this, does this make you eat? Throw this in the garbage" and pulled her sleeve. Krosta responded she liked the color. Then Colicchio continued, "Why are you for 808, why don't you go for 222? They pay you better, you are stupid. Everybody else going for 808 are stupid. 222 will pay you more money." Colicchio then said, "I do not understand anything and we are all crazy." The conversation then turned to the cosmetics and Krosta soon walked away. Colicchio was not called to the stand to rebut these remarks and I credit them. The conversation was conducted in Italian. A young employee supporter of 808 was nearby and farther away were four female employees talking with each other.

Three employees, Adolpho Fanna, Carlos Espinal, and Carlos Llaguno, each testified in substantially similar terms to a conversation which they held with Colicchio in the last week of November.[52] The three, among five or six employees, were at the workplace on the Second floor of the Skillman Avenue plant where they inspect, repair, or adjust staple machines. They were talking among themselves about the election and their concern

[43] See *Fabriko, Incorporation*, 227 NLRB 387 (1976); *Alley Construction Company, Inc.*, 210 NLRB 999, 1004 (1974); *Builders Supply Co. of Huston*, 168 NLRB 163, 165, fn. 13 (1967), modified in other respects 410 F.2d 606 (1969); *Gold of California, Inc.*, 123 NLRB 285, 286 (1959).

[44] *Builders Supply Co., supra.*

[45] *Alley Construction Co., supra.*

[46] See *N.L.R.B.* v. *Builders Supply, supra* at 607-608.

[47] See *PPG Industries Inc., supra*; see also *Duvernoy & Sons, Inc.*, 177 NLRB 538 (1969) (Here two unions sought to represent Respondent's employees. When a supervisor stated to an employee that "[c]an't [the employees] see that we won't have jobs if Local 3 gets in here," the Administrative Law Judge was affirmed in his conclusion that this statement violated Section 8(a)(1) of the Act. *Id.* at 540).

[48] See *Fabriko, supra*, 227 NLRB at 387, fn. 2.

[49] Mateo, as noted above, has been determined to be a supervisor under Sec. 2(11) of the Act. However, even if this were not the case, his comments would be attributed to Respondent since his "responsibilities put him in a position to be identified with management in the eyes of the employees . . . ." *The Huntington Hospital, Inc.*, 227 NLRB 316, 317-318 (1976) (Here, an individual, not even employed by Respondent, was considered to have been viewed by Respondent's employees as a management representative, and thereby made Respondent responsible for this person's statements).

[50] See *G. C. Murphy Company*, 223 NLRB 604, 609 (1976); *Katz Corporation, d/b/a Holiday Inn of Chicago-South, Harvey*, 209 NLRB 11 (1974).

[51] Respondent Swingline admitted his supervisory status under the Act, but denied that Colicchio acted on its behalf with respect to the complaint allegations. The testimony disclosed that Colicchio performs the foreman's duties in his absence; regularly issues job orders, transfers employees from job to job, and oversees and attends to employee needs at the workplace.

[52] Recall that the election had been conducted a month earlier but IPSSEU's objections were still pending.

that the Teamsters would not become their bargaining representative even though they needed a union to obtain raises which had been withheld over the past year while the cost of living continued to rise. Colicchio came by and heard this discussion. He said that it would be very difficult to get 808 in. The Company was very powerful and strong. It could move within 24 hours to another State and we would be left without work.[53] The three employees agree that Fanna responded that the statement was very strange. He, Fanna, understood that the Teamsters could come in when the Department of Labor carried out the election, that the employees had won with an absolute majority of votes and the president of the Company, Thomas, had assured the employees before hand that no matter what the results of the election the Company would recognize them as valid. Llaguno added that it would be impossible to move the factory because installations cost thousands, millions of dollars, and the Company would also need permission from the State in order to move. The conversation took place in Spanish. Colicchio did not respond and left. I credit the employees' corroborative testimony, particularly in the absence of any rebuttal from Colicchio.

Carmilio Reyes, a floorboy on the materials line, testified to a conversation with Colicchio held at approximately 1:45 p.m., in January 1980, near the elevator where materials are left. Reyes was wearing a printed Teamsters T-shirt like the one worn by Victoria Krosta as well as a Local 808 button, colored white with blue letters. Colicchio pointed at Reyes, flipped the button with his fingers and said, "Those horses are not going to come in here unless the Company wants them to." Reyes replied he hoped they would get in. Colicchio changed the subject, saying, "Hey, let's go to work." I credit Reyes' testimony.

Resolution

It is well established that an employee may wear union insignia (e.g., buttons, T-shirts, etc.) while at work, absent special circumstances; and any interference by the employer with this right violates Section 8(a)(1) of the Act.[54] Although Colicchio did not force Krosta to remove the Local 808 shirt, I find that his statement, to throw the shirt in the garbage, interfered with her display of union insignia and therefore her Section 7 rights. furthermore, the comment had the direct effect of interfering with Krosta's protected activity on behalf of the Teamsters. Similarly, Colicchio's statement to employees Fanna, Espinal, and Llaguno, about moving the plant if 808 "came in," violated Section 8(a)(1) of the Act. It has long been recognized that a threat of plant closure made in the context of a union organization campaign is a potent weapon of an employer in interfering with its employees' Section 7 rights.[55] Even if Colicchio had implied that this was his belief, this would not lessen the impact.[56] Although Fanna's and Llaguno's responses indicate that they doubted that Swingline would relocate this is not sufficient to dissipate the coercive effect it had on them or the other employees who heard the statement.[57]

The Board has long held that an employer's statements which indicate the futility of voting for a union or engaging in unionization in general violate Section 8(a)(1) of the Act. Where an employer indicates that it is he who controls what will or will not be done, irrespective of the union's presence, such futility is made clear.[58] Colicchio's statement to Reyes that Local 808 would not "come in" unless the employer wanted them to, even though it had won the election, clearly conveyed that it was futile to have voted for this union or to continue to support it, and thus constitutes unlawful 8(a)(1) conduct.

D. *Conclusions With Respect to the Objections to Conduct Affecting the Results of the Election*

My findings with respect to Respondent's misconduct alleged in the consolidated complaints and objections during the critical period are contained in subsection C, above. They show that Assistant Foreman Colon uttered a threat to employee Rivera in the presence of a few other employees in late September and also that personnel clerk Mateo interrogated employee Miles while they were alone prior to Mile's voting on election day. All other complaint and objection allegations have been found to lack merit, not to warrant a rerun election[59] or have been discredited.[60] Another finding is that, the day before the election, Assistant Foreman Colicchio interfered with employee Krosta's protected display of Teamsters insignia and related protected conduct.

Colon's total conduct on its face manifests support of the Teamsters, while Colicchio's favored IPSSEU. Further support of IPSSEU, at least by floor supervisors, is apparent from the freedom granted Griffin in soliciting for that union on working time at the workplace in the months preceding the election and, in particular, on election day. IPSSEU was also favored, again at least by virtue of the inaction of floor supervision, by their representatives having daily access to work areas to electioneer and propogandize on working time during the critical period including election day.[61]

[53] I credit this version provided by Carlos Llaguno. It is only the former portion of the statement which differed slightly, with Fanna claiming Colicchio said "when the Company wanted that's when the Union would enter" and Espinal asserting Colicchio said "the Teamsters would never come in."

[54] See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945); *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1000 (10th Cir. 1977).

[55] See *Aircraft Hydro-Forming Inc.*, 221 NLRB 581, 590 (1975).

[56] *Id.* at 590.

[57] In *Aircraft Hydro-Forming*, fn. 53, *supra*, the employee stated that he doubted the supervisor's claim that the Employer would close the plant. However, this did not prevent the Board from affirming the Administrative Law Judge and finding the supervisor's statement coercive. *Id.* at 590.

[58] See, e.g., *Kenworth Trucks of Philadelphia, Inc.*, 229 NLRB 815 (1977) (Here the employer told an employee prior to his voting that no matter how the election turned out, it was his company and he would run it any way he pleased. *Id.* at 818. This statement was held to have violated Sec. 8(a)(1)).

[59] Even considered under the more restrictive standard applicable to objections, see, generally, *General Shoe Corporation*, 77 NLRB 124, 126–127 (1948).

[60] No testimony was presented with respect to Supervisor Irving Sloane's alleged solicitation of Teamsters support set forth at p. 26 of the Regional Director's Supplemental Decision and Report on Objections.

[61] Ostensibly, IPSSEU was servicing its contract. Actually, some of the time was spent in propagandizing. Various witnesses testified to such

Continued

Respondents' conduct thus substantially equally favored and opposed both unions. Under such circumstances, the Board has not permitted misconduct, equally affecting both unions to allow the wrongdoer, the employer, to profit thereby at the expense of the successful union. The losing union's objections may not prevail in the face of employer opposition to both, particularly where the results show substantial support for the winning union.[62] Accordingly, absent any particular misconduct which disproportionately supported the Teamsters, IPSSEU's objections should be overruled. I turn now to a closer examination of Respondents' conduct favoring the Teamsters and, in particular, the one threat found, made by Colon, to determine whether they tended to restrain employees in their free choice to reject the Teamsters,[63] and, thus, warrant a second election.

The central focus in weighing objections is whether the conduct found under all of the circumstances disclosed by the record has sufficiently impaired the employees' freedom of choice of representative, so as to warrant setting aside the election. While it is generally Board policy that conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election,[64] it is also nonetheless true that not every item of objectionable conduct, including acts of interference with employee exercise of rights guaranteed them by Section 7 of the Act, will merit invalidating an election.[65] The Board has had occasion recently to reiterate its long held view[66] that while seeking to establish ideal conditions insofar as possible under which employees register their choice, it must appraise the actual facts in the light of realistic standards of human conduct. "Otherwise, in any hard fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results."[67]

In appraising the facts, the Board examines the impact of statements made and is concerned with various indicia which help in determining whether the conduct, particularly acts of restraint, coercion, or interference with Section 7 rights, is of such a nature as to disclose an atmosphere of fear and reprisal among voters.[68] While under certain circumstances a threat made to a single employee in a voting unit of 140 has resulted in setting aside an election,[69] "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors,"[70] are all considered in weighing the impact of the conduct on the electorate and whether it could have affected the results of the election.

Applying the Board's standards to Respondents' conduct on the record, I conclude that the single interrogation, threat, and statements of Teamsters support within the critical period are insufficient to warrant setting aside the election. Each of them as an action of a single low-level supervisor acting informally on the plant floor, and generally was a casual response to employee inquiries or interjections in union related conversations already underway among employees. The number of employees affected were slight, and the conduct, generally, while sufficient in a number of instances to justify findings of 8(a)(1) violations and a remedial order,[71] did not rise to the seriousness or impact on employees which should result in setting aside the two elections in which eligible employee participation exceed 90 percent in units of 1,174 and 113, and which were won by the Teamsters by 2 to 1 margins. Given the size of the units and length of the campaigns, conduct interfering with employee rights which is attributable to the employers was minor indeed. Even where conduct violated the Act, employee responses were such that intimidation appeared to be limited in its impact. Furthermore, there was no evidence of concerted antiunion activity or a preconceived campaign by the supervisors involved; the Employers impressed upon the employees and supervision their interest in maintaining neutrality.

In particular, I conclude that the most serious item of coercion, Colon's threat of layoffs made to Rivera in the presence of a few other employees about a month before the election, could not be said to have affected the results of the election. Unlike the threat in *Greenpark Care Center, supra*, it was uttered by a low-level supervisor who had previously informed the employee, Rivera, to whom his remarks were principally addressed, that he

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solicitations on the part of IPSSEU delegates Rivera, Rodriguez, and others. Nagle testified that he received a complaint from a Teamsters attorney on election day that Swingline was favoring IPSSEU by permitting its representatives access to plant working areas and prohibiting Teamsters access, and Nagle responded he would advise the company attorney. As noted, Nagle justified Respondents' leniency on the ground that the Companies wanted to avoid problems with the incumbent union. The testimony regarding preferential treatment of IPSSEU was received over strenuous General Counsel and IPSSEU objections. My ruling appears at Tr. 552 to 558. I deemed such evidence relevant on the question being addressed as to whether there existed employee opposition against both unions sufficient to deny support to the objections of one where the other won decisively. I noted that I may examine such conduct even though not the subject of a Teamsters charge and admittedly not alleged as objectionsby the winning union.

[62] *The Nestle Company*, 248 NLRB 732 (1980); *Flat River Glass Co.*, 234 NLRB 1307 (1978); *Packerland Packing Company, Inc.*, 185 NLRB 653 (1970); *Showell Poultry Company*, 105 NLRB 580 (1953).

[63] Since the Teamsters won, a further examination of Colicchio's acts of interference against a Teamsters supporter would not aid this analysis.

[64] *Dal-Tex Optical Company Inc.*, 137 NLRB 1782 (1962); *Playskool Manufacturing Company*, 140 NLRB 1417, 1419 (1963).

[65] See, e.g., *Mississippi Valley Structural Steel Company*, 196 NLRB 1129 (1972); *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253 (1964).

[66] See *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). See also *Morganton Full Fashioned Hosiery Company, Huffman Full Fashioned Hosiery Mills, Inc.*, 107 NLRB 1554 (1954).

[67] *Newport News Shipbuilding and Dry Dock Company*, 239 NLRB 82, 91 (1978).

[68] *Essex International, Inc.*, 216 NLRB 831 (1975); *Alley Construction Company, Inc.*, 210 NLRB 999 (1974); *Mississippi Valley Structural Steel Company supra*, and *Hy Plains Dressed Beef, Inc., supra*.

[69] *Sol Henkind, an Individual, d/b/a Greenpark Care Center, formerly known as Willoughby Health Related Facility*, 236 NLRB 683 (1978), where the employers' comptroller asked an employee who she was voting for and then threatened her that if she did not vote for one of the unions she was going to lose her job. The Board noted that it was coercion of a most serious nature committed by a high-level supervisor shortly before the election where the presumption of repetition among voters was fulfilled by the comptroller's followup order to the employee to spread the word to the other employees.

[70] *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977).

[71] But see *Globe Shopping City, supra*.

had been restrained in speaking freely.[72] Employee knowledge of Colon's violation of the company policy of neutrality derived as well from the president's May letter to all employees serves to diminish the severity of Colon's remarks, particularly given Colon's low status and lack of evidence of any authority to discharge or even recommend discharge.[73] The threat here was also made in the context of an informal exchange among a small group at the workplace, lacking in the more direct and personal questioning and threat found in *Greenpark*. Of greater significance, Colon's remarks were not exclusively supportive of the Teamsters. They were subject to varying interpretations; 222 supporters might very well have been encouraged to continue their assistance to IPSSEU to help insure that 222 won since they would not be affected and 808 supporters present might have been discouraged from continuing their support of the Teamsters (even though they could still vote for the Teamsters) because they wished to diminish the likelihood of their own layoff. Finally, there is no evidence here, unlike *Greenpark*, that Colon actively encouraged circulation of his threat among other employees.[74] I therefore conclude that Respondents' conduct violative of Section 8(a)(1), in particular Colon's threat, fall within the recognized exception to the Board's policy that such conduct, *a fortiori*, interferes with the free choice in an election.[75]

Accordingly, given the isolated, minor, casual, and relatively nonintimidating nature of the few low-level supervisor's comments during the critical period, in a setting in which employees were made aware of the Employers' interest in allowing them to decide the representation question for themselves, I conclude that the conduct found does not establish substantial interference with the elections, and I shall recommend that the election results not be overturned and that the Board certify the Teamsters.

CONCLUSIONS OF LAW

1. Respondents violated Section 8(a)(1) of the Act by interrogating their employees concerning their union and other protected activities, warning them to cease displaying union insignia and engaging in union and other protected concerted activities, and by threatening them with a plant relocation, layoff, and loss of employment if they assisted, became, or remained members or persisted in supporting either IPSSEU or the Teamsters.

2. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondents have not engaged in any unfair labor practices not specifically found herein; specifically, Respondents have not violated the Act by discharging employee John Griffin nor have they violated the Act by making unlawful promises of benefit to influence employees to support either union as against the other in the election campaign.

4. Respondents have not engaged in any conduct warranting that the elections conducted on October 25, 1979, in Cases 29-RC-4658 and 29-RC-4659 be set aside.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, I hereby issue the following recommended:

ORDER[76]

The Respondents, the Swingline Company and Spotnails, Inc., Long Island, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating their employees as to their union sympathies, warning them to cease engaging in concerted activities on behalf of Local 222, affiliated with International Production, Service and Sales Employees Union or Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and threatening them with loss of employment if they supported or continued to support either labor organization.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions designed to effectuate the policies of the Act:

(a) Post at each of the premises located in Long Island City, Queens, New York, copies of the attached notice, marked "Appendix A."[77] Copies of this notice, on forms provided by the Regional Director for Region 29, shall be signed by a representative of Respondents and shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by them to insure that said notices are not altered, defaced, or covered by any other material.

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[72] The presumption is warranted that Rivera and the other employees who heard Colon's threat and others to whom it may have been relayed were aware that he, Ocasio, and all other supervisors had been warned to refrain from electioneering at the risk of loss of their jobs, as testified to by employee Bueno, See fn. 20, *supra*.

[73] Recall that Colicchio's threat to 808 adherents after the election was generally discounted by the employee recipients, in part in explicit reliance on Company President Thomas' written commitment to abide by the election results.

[74] The cases cited in *Greenpark, supra* at 684 fn. 10, which illustrate the Board's willingness to set aside elections even where the violative conduct is directed at a few employees in a large unit, are distinguishable. In these cases the key factors for setting aside the election appear to be that the violative conduct was committed by a high-level supervisor and/or the election results were very close. Neither of these conditions exist in the instant case.

[75] See *Greenpark Care Center*, and *Super Thrift Markets, Inc. t/a Enola Super Thrift, supra*.

[76] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[77] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER RECOMMENDED that the consolidated complaints be dismissed in all other respects.

IT IS FURTHER RECOMMENDED that the Objections to the elections conducted in Cases 29-RC-4658 and 29-RC-4569 be overruled and that certifications of representative be issued to Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.